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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-829

GLENN L. MORGAN,

Petitioner,

versus

STATE OF LOUISIANA EX REL GUY WOOTAN CUSTODIAN OF NOTARIAL RECORDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Glenn L. Morgan
P. O. Drawer 51478
New Orleans, La. 70151
In proper person

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

GLENN L. MORGAN,
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versus

STATE OF LOUISIANA EX REL GUY WOOTAN
CUSTODIAN OF NOTARIAL RECORDS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Louisiana entered in this case on September 12, 1975.

OPINIONS BELOW

1. The judgment of the Civil District Court for the Parish of Orleans dismissing the exceptions of prematurity and unconstitutionality filed by Glenn L. Morgan, June 27, 1974. Unreported but included in the appendix at page 1a.

2. The judgment of the Court of Appeal, Fourth Circuit of the State of Louisiana affirming the Civil District Court and the dissent, issued on May 22, 1975 and reported at 313 So. 2d. 621 and included in the appendix at page 3a.

3. The judgment of the Supreme Court of Louisiana affirming the judgment of the Louisiana Court of Appeal, Fourth Circuit, issued on September 12, 1975, reported at 318 So. 2d. 47 and included in the appendix at page 14a.

JURISDICTION

The Supreme Court of Louisiana entered judgment on Sept. 12, 1975. No request for rehearing is permitted under such circumstances under the rules of the Supreme Court of Louisiana. This petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257 (3).

QUESTION PRESENTED

Whether Louisiana can by statute, La. R. S. 35:251 et seq. treat Notaries Public for the Parish of Orleans different by requiring the Orleans Parish Notaries to pay an annual fee for the benefit of a political appointee and to post a bond ten times higher than that required in the adjacent Parishes which have been included in the same Standard Metropolitan Statistical Area by the U. S. Bureau of the Census without offending the Equal Protection Clause of the 14th Amendment of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The first section of the 14th Amendment to the Constitution of the United States provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Louisiana Revised Statute 35:191 [21 LSA R. S., 1974 P. P. p. 134] provides:

> "Any citizen of the state may be appointed a notary public in and for the parish in which he resides, upon giving bond, with good and solvent security in the sum of one thousand dollars . . ."

3. Louisiana Revised Statute 35:253 [21 LSA R. S., p. 400] which pertains only to Orleans Parish provides:

> "Any citizen of the state over twenty-one years of age and a resident of the Parish of Orleans for at least two years next preceding his appointment, being of good moral character, integrity, competency and sober habits, may be appointed a notary public in and for the Parish of Orleans, upon giving bond with one or more good and solvent sureties, in the sum of ten thousand dollars . . ."

4. Louisiana Revised Statute 35:327 [21 LSA R. S., 1974 P. P. p. 137] which pertains only to Orleans Parish provides:

> "Each notary shall pay an annual fee of fifteen dollars, on or before September 1st of each year, to the custodian, the said fees to be used by the custodian for additional compensation and expenses of his office."

5. Louisiana Revised Statute 35:328 [21 LSA R. S. p. 416] which also only pertains to Orleans Parish provides:

> "The custodian shall institute by proceedings by rule in the Civil District Court of the Parish of Orleans at least once every twelve months, and oftener if he deem it proper and necessary, without payment of costs by the custodian, on all notaries in the parish to test the surety on their official bonds . . ."

STATEMENT OF THE CASE

On April 22, 1974, the Custodian of Notarial Records in and for the Parish of Orleans filed a rule against each Notary Public for the Parish of Orleans to test the surety on each notarial bond, to have all notarial acts deposited in his office, and to collect the annual fee allowed him by law.

In response to this rule petitioner, Glenn L. Morgan, an attorney and notary in the Parish of Orleans, filed a dilatory exception of prematurity in regards to that portion of the rule concerning the fee on the basis that

R. S. 35:327 provides that the fee is not due before the 1st of September of each year and a peremptory exception of "unconstitutionality of R. S. 35:251 et seq." on the basis that such sections violate the requirement of the 14th Amendment of the Constitution of the United States in that a Notary in Orleans Parish is treated without reason in a different manner than the Notaries in the other Parishes.

The trial court dismissed the exceptions and an appeal was had.

The court of appeal held that the request for an order to pay the fee in April or May, though the fee was not due until September, was not premature because the Custodian was not seeking premature collection of the fee but rather an order to pay the fee before the deadline.

The court of appeals majority held that perhaps the density of Orleans Parish could be the reason that Orleans Notaries have to undergo the requirements of the high bond and the annual rule. The court presumed that the legislature had good reason for the $15.00 fee. The majority concluded that they had conceived of a state of facts which could justify the discrimination or unequal treatment and hence affirmed the district court. The court held that appellant provided no proof of absence of differences between Orleans and other parishes.

Judge Morial in his dissent found the statutes in question, "command dissimilar treatment among notaries who are similarly situated and produces invidious discrimination." Judge Morial felt that a re-

mand was necessary for a hearing to determine if there is a reasonable basis for the statutes.

The motion for a rehearing in the court of appeal pointed out to the court that the petitioner had cited data from the U. S. Census to the effect that Orleans and Jefferson Parishes were classified as part of the same "city" or SMSA and hence the Federal Government experts had already determined with the force of law that there was no territorial difference between those Parishes; hence no further proof was needed.

The majority refused a rehearing but Judge Morial voted to grant one.

The Supreme Court of Louisiana refused to grant a writ of certiorari or review holding that the result of the Court of Appeal was correct.

REASON FOR GRANTING THE WRIT

This court has adopted perhaps incorrectly, two standards for measurement of constitutionality. One general standard is that all acts of the State are presumed valid and the burden for showing that that state's failure to treat all alike has no rational basis is on the citizen. The other standard summed up in *Goosby v. Oser*, 409 U. S. 512, 93 S. Ct. 854, 859, 35 L.Ed.2d 36 (1973) is that there must be applied "the more stringent compelling state interest test when either a fundamental right was allegedly infringed or when the statutory classifications were drawn on the basis of suspect criteria."

The question is under what standard these facts fit?

Petitioner suggests that there is no rational basis for the discrimination.

This court has recently had before it one of the many Louisiana different treatment laws in the case of *Levy v. Parker*, D. C. La. 1972, 346 F.Supp. 897, affirmed 93 S. Ct. 2266, 411 U. S. 978, 36 L. Ed. 2d 955 in which the provisions of Louisiana law which provided different tax treatment of Orleans Parish was declared unconstitutional.

As to taxes this court held that all persons within the same class are protected against unequal taxes in *Hopkins v. Southern California Telephone Co.*, Cal. 1928, 48 S. Ct. 180, 275 U. S. 393, 72 L. Ed. 329. Why ask you this reference to tax cases? Is not the fee in R. S. 35:327 a sort of occupational tax? What else could it be called? The notary is a public official, but what other official has to pay the state? Therefore not only is the Orleans notary, the only subclass of the class of all notaries to be required to pay any, but he or she is the only subclass of the class of public officials which must pay a fee to exercise his office.

What is the nature of this fee? La. R.S. 35:323 provides that the Custodian shall receive three dollars per act filed in his office. This fee one presumes to be the amount to cover actual expenses since it has been raised from time to time. R. S. 35:251 limits the number of Notaries in Orleans Parish to 1900 and this number has been raised rather often. R. S. 35:327 permits the Custodian to use the $15.00 fee from each notary as additional salary. The custodian has then in addition to the salary already authorized by law, the potential of

$28,500 in salary. This office does not exist in the other parishes. The reasonable man looking at this scheme would certainly surmise that the intent was to take money from the Custodian and give it to the Custodian. This court in *Citizens' Sav. & Loan Asso. v. Topeka* (1975) 20 Wall 655, 664, 22 L. Ed. 455, 461 held that taxation to aid favored individuals is none the less robbery.

Only a Notary Public in Orleans Parish is subject to the requirement of a $10,000 bond. Notaries in the adjacent parishes can and do pass acts every day which affect the citizens of Orleans Parish as well as real property located in Orleans Parish and they need only post a $1,000 bond. What reason for the difference. Am I as a citizen of New Orleans more likely to make mistakes or less honest than the population as a whole? This question was raised below and was not answered. The Census data taken from the Statistical Abstract of Louisiana (Fifth Edition 1974) p. 39 was cited below to show that Orleans, Jefferson, St. Bernard, and St. Tammany Parishes have been classified by the Bureau of the Census since 1960 as on Standard Metropolitan Statistical Area, which means it has been determined by study that they are socially and economically integrated and function as a "city". What sense is this — the Census Bureau says I live in the same "city" as does the notary in Jefferson Parish, I have to drive through a portion of Jefferson Parish to get to the west bank portion of Orleans Parish and yet I have to endure a yearly rule, pay the Custodian $15.00 per year and have a $10,000 bond whereas the Jefferson notary need only post a $1,000 bond? But alas the courts of Louisiana tell us that this is reasonable? I

would submit that denial of such basic equality places the burden on the state to justify such laws.

How did the law evolve so? Louisiana was originally a French and Spanish Crown Colony, at least when the laws and government was established. Under the old French and Spanish law the Notary was a special officer appointed by the king to preserve documents much in the same manner as the Scribe in ancient Babylon. At that time few could write and the notary acted for the public, by preparation of documents and their preservation. He was required to have regular office hours and keep his records in a building which was relatively fireproof. The early laws concern New Orleans since New Orleans was the only city for some time. When Louisiana became a state the old established custom was continued in New Orleans with a limited number of notaries, who kept all the acts including acts affecting real property in their offices. New Orleans notaries had other powers also so that the higher bond could then be justified. The office of Custodian was necessary because when a notary died or left the state, someone had to have custody of these vital records so that the public could consult them. This practice soon became unworkable as the size of New Orleans increased and the legislature changed the law so that the Orleans notary had no special authority and had to file his acts in the public records. However although the reason for the Custodian's existence had ended and the legislature could have provided Orleans Parish with a Clerk of Court to perform this function, as was the case in other parishes, by mere merger of the office with the existant Clerk of Civil District Court, the legislature increased the salary of the Custodian.

Well! Only in Louisiana.

CONCLUSION

Since there is no logical reason why I should have to pay a fee, be subjected to a yearly bond or be subjected to a bond ten times higher than members of the same class (notaries) of officials who work in the same statistical "city" because of La. R. S. 35:251-337 it is submitted that this portion of Louisiana law violates the equal protection clause of the 14th Amendment of the Constitution of the United States, and a writ of certiorari should issue to review the judgment and the opinion of the Supreme Court of Louisiana.

Respectfully submitted.

Glenn L. Morgan
P. O. Drawer 51478
New Orleans, La. 70151

Petitioner in
proper person

CERTIFICATE OF SERVICE

I, Glenn L. Morgan, a member of the bar of the Supreme Court of the United States, certify that a copy of this petition has been served on:

Ronald P. Whittington
1649 FNBC Building
New Orleans, La. 70112

Attorney for Guy Wootan,
Custodian of Notarial Records
for the Parish of Orleans

And

William J. Guste, Jr.
State of Louisiana
Department of Justice
New Orleans Office
7th Floor
234 Loyola Ave.
New Orleans, La. 70112

The Attorney General for the
State of Louisiana

by placing same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of December, 1975.

_____

Glenn L. Morgan

APPENDIX

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 571-813 DIVISION "A" DOCKET #5

STATE EX REL
GUY WOOTAN
CUSTODIAN OF NOTARIAL RECORDS

IN RE: PRAYING FOR THE TESTING OF THE SURETIES ON NOTARIAL BONDS

FILED: _____ DEPUTY CLERK _____

JUDGMENT

This cause came for trial on this date on the exceptions of prematurity and unconstitutionality filed herein, by Glenn L. Morgan

PRESENT: GLENN L. MORGAN, In Proper Person

LOUIS M. JONES, JR., Attorney for William J. Guste, Jr., Attorney General for the State of Louisiana

GUY WOOTAN, Custodian of Notarial Records for the Parish of Orleans

RONALD P. WHITTINGTON, Attorney
for Guy Wootan, Custodian of Notarial
Records for the Parish of Orleans

When after hearing the pleadings, evidence and arguments of counsel and parties the law and evidence, being in favor of Guy Wootan, Custodian of Notarial Records, for the Parish of Orleans, for the reasons this day orally assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that the res judicata pleading filed herein by Guy Wootan, Custodian of Notarial Records, Parish of Orleans, be and the same is hereby dismissed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the exceptions of prematurity and unconstitutionality filed herein by Glenn L. Morgan be and the same are hereby dismissed, with prejudice, at exceptor's cost.

JUDGMENT READ, RENDERED, AND SIGNED in open court in New Orleans, Louisiana, on this 27th day of June, 1974.

/s/ THOMAS A. EARLY
JUDGE

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

STATE EX REL GUY WOOTAN
CUSTODIAN OF NOTARIAL BONDS

NO. 6897

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, DIVISION "A", NO. 571-813. HONORABLE THOMAS A. EARLY, JR., JUDGE.

PATRICK M. SCHOTT
JUDGE

(Court composed of Judges Patrick M. Schott, Ernest N. Morial and Peter H. Beer)

RONALD P. WHITTINGTON,
Attorney for Plaintiff-Appellee

GLENN L. MORGAN, IN PROPER PERSON,
Defendant-Appellant

WILLIAM J. GUSTE, JR., WARREN E. MOULEDOUX, LOUIS M. JONES, ROBERT E. REDMANN (Robert E. Redmann),
Attorneys for the State of Louisiana, Appellee

MAY 22, 1975 AFFIRMED AND REMANDED

On April 22, 1974, the Custodian of Notarial Records in and for the Parish of Orleans filed a rule against each Notary Public for the Parish of Orleans to test the surety on each notarial bond pursuant to LSA-R.S. 35:328, to have all notarial acts deposited in his office in accordance with R.S. 35:323, and to collect the annual fee prescribed by R.S. 35:327. Attached to his rule was a form of interrogatories seeking the information required to be filed by notaries with the Custodian under R.S. 35:326. In response to this rule appellant, Glenn L. Morgan, Notary Public for the Parish of Orleans, filed a dilatory exception of prematurity and what he styled the peremptory exception of "unconstitutionality of R.S. 35:321 and seq." From a judgment dismissing his exceptions appellant has appealed.

At the outset we notice that the procedural posture of the case is unusual in that the judgment appealed from is not a final judgment against appellant but only overruled his exceptions. There is no further judgment making the Custodian's rule absolute against appellant.

However, the matter came to trial on a rule and, under LSA-C.C.P. Art. 2593, no answer was required of appellant. He relied on the theory that the unconstitutionality of the statutes complained of was patent from their very wording, he chose to offer no evidence in support of his position, and the issue of the unconstitutionality of the statutes was fully tried as though it had been pleaded in an answer. If we reverse the trial court and hold that the statutes which the Custodian seeks to enforce are unconstitutional no further proceedings will be authorized. On the other hand, if we

affirm the trial court there will be a final disposition of the defense based upon unconstitutionality of the statutes, but the matter will have to be remanded to the trial court for further proceedings which the custodian might deem appropriate to enforce the statutes. With this introduction we now consider the issues raised by appellant.

THE EXCEPTION OF PREMATURITY

As we have already indicated, the rule brought by the Custodian consisted of several parts, but it is only with respect to the payment of the annual fee that appellant contends the rule is premature. His position is that since R.S. 35:327 requires the payment of the annual fee "on or before September 1 of each year" the rule filed in April is premature on its face. The Custodian's answer is well taken. He shows that in the discharge of his duty to collect the annual fee by September 1 from hundreds of notaries in Orleans Parish, the maximum number being fixed at 1900 by R.S. 35:251, he must initiate administrative action in advance of the deadline for the collection. His rule on April 22 directed the notaries, including appellant, to show cause "why he should not be ordered to pay the custodian the annual fee," was clearly not an attempt to enforce collection of the fee before the deadline. The chronological development of this case demonstrates the wisdom of the Custodian's initiating his proceedings well in advance of the September 1 deadline. Since the Custodian's rule was clear that appellant was being ordered to show cause why he should not pay the fee before the deadline and since the Custodian was not attempting to make a premature

collection of the fee, the exception of prematurity was properly overruled.

THE EXCEPTION OF UNCONSTITUTIONALITY

As already stated, we do not consider this defense of unconstitutionality to be an exception at all but rather a defense on the merits, which would ordinarily be incorporated in an answer but which did not have to be filed in answer since no answer is required to a rule to show cause in the first instance.

In his exception appellant contended that the entire statutory scheme covering Orleans notaries deprived them of equal protection of the law as required by the Fourteenth Amendment to the Constitution of the United States in that only Orleans notaries are required to pay the annual fee of $15, R.S. 35:327, only Orleans notaries are required to post a $10,000 bond, R.S. 35:253, as compared to a $1,000 bond for notaries in other parishes (except Caddo Parish), R.S. 35:191, only Orleans notaries are subject to the annual rule to test the sureties, R.S. 35:328, and only Orleans notaries are subject to the special filing provisions established by R.S. 35:323. In this Court appellant has placed special emphasis on the first two differences mentioned, namely, the fee and the bond.

The Custodian's principal contention is that the legislature in making these distinctions is presumed to have acted within its constitutional power despite the fact that laws in practice might result in some inequality. He maintains that the burden of proof was upon appellant to rebut this presumption and that his

failure to offer any evidence to support his position is fatal to his case. Appellant, on the other hand, contends that these statutes on their face have no reasonable basis for making a distinction between the notaries of Orleans Parish and those of the other parishes, and he maintains that he should not be made to prove the obvious or that which courts should judicially notice. Such a burden of proof would be especially onerous he contends since he would be cast in the role of trying to prove a negative, to wit, that there is no reasonable basis for the distinction or for the special class into which Orleans notaries are placed.

In *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed.2nd 393, 81 S. Ct. 1101, the following principles were enunciated:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Appellant's theory is embodied in the final sentence quoted above, to wit, that "a *statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*" Appellant contends that no state of facts can reasonably be conceived to justify the discrimination made by the legislature against Orleans notaries and that no proof is needed beyond a reading of the statutes. We disagree.

One can readily criticize these provisions which require Orleans notaries to pay the $15 fee and to post a $10,000 bond. For instance, conditions have drastically changed since the amount of the bond was set by Act 42 of 1890. Again, any notary public is empowered to pass an act of sale affecting real estate located in Orleans Parish and have his sale processed by the Custodian's office with the same risks to the parties to the act as are attendant upon the passage of such an act by an Orleans notary. Yet the non-Orleans notary need have a bond for only $1,000 whereas the Orleans notary must have a $10,000 bond to exercise the same powers. The risk against which the bond protects is the same in either case. Furthermore, the greatest risks or at least those occurring with the most frequency are those related to acts involving real estate which can be passed with as much ease by a non-Orleans Parish notary as by an Orleans notary.

But despite these considerations we can still conceive of reasonable facts which the legislature might have considered in establishing the distinction. For instance, R.S. 35:2 lists a number of powers granted to notaries, some of which are perhaps even more serious than those which affect real estate, and the power of the notary to function is limited to the Parish

where he is commissioned, R.S. 35:2 and 10. Even the power of a notary to administer oaths and take acknowledgments is limited to the parish where he is commissioned. Op. Atty. Gen. 1934-36, p. 818 and 1920-22, p. 899. Perhaps the legislature believes that the density of the population in Orleans Parish is still such that the potential of the Orleans notary to exercise his official functions is still greater than that of the notary commissioned outside of Orleans Parish and that these conditions operate to justify greater protection to the public in the form of a higher bond for Orleans notaries than elsewhere. Perhaps the legislature believes that this higher potential for functioning requires a closer method of checking on Orleans notaries with the attendant annual fee and the regular reporting system provided by the statutes.

Furthermore, in providing for the $15 fees "to be used by the Custodian for additional compensation and expenses of his office" the legislature is aware that in other parishes the clerk of court himself, or, through a deputy or a department, operates the archives for the deposit of notarial acts, and the cost of operating such facilities is absorbed or defrayed by the overall schedule of fees charged by the clerk for the various operations of his office. The fact that there are separate offices in the Parish of Orleans for the Custodian as well as the Register of Conveyances, the Recorder of Mortgages, and other officials, as opposed to other parishes where the clerk operates all of these facilities himself, provides many complex questions as to whether it is more economical for one office or separate offices to operate these facilities and whether the public in general is paying more or less for such services. Obviously, these questions all addresss

themselves to the legislature and we must presume that they had some reasonable basis for deciding that the $15 fee charged to Orleans notaries was a reasonable method of defraying some of the expenses involved in the operation of the Custodian's facilities.

Perhaps the foregoing ruminations do not justify the discrimination against Orleans notaries in the opinion of many but from our point of view as a Court considering appellant's position that the statutes are thereby unconstitutional we have concluded that they pass the test established in *McGowan v. Maryland*, supra, to wit, that the statutory discrimination will not be set aside since "a state of facts reasonably may be conceived to justify it."

The principle on which we may have decided this case was recognized in *State v. Guidry*, 247 La. 631, 173 So.2d 192, where the argument that a criminal statute was unconstitutional because it applied to only one parish in the state was rejected by the Court as follows:

> "[Defendant], of course, has made no showing that the relevant conditions and needs in Jefferson Davis Parish are the same as those of the other parishes. See McGowan v. State of Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393. The Court cannot assume the absence of differences when there is no proof."

Neither can this Court in the instant case assume the absence of differences between Orleans and the other parishes with respect to regulation of notaries when appellant has provided no proof.

Accordingly, the judgment appealed from is affirmed. The case is remanded to the District Court for further action which the custodian may deem appropriate.

AFFIRMED AND REMANDED

STATE EX REL GUY WOOTAN, CUSTODIAN OF NOTARIAL RECORDS

No. 6897

IN RE:
PRAYING FOR THE TESTING OF THE SURITIES ON NOTARIAL BONDS

MORIAL, J., DISSENTING

Except for the differences in the bond required of Notaries Public of the Parish of Orleans ("* * *ten thousand dollars * * * subscribed in favor of the governor and conditioned for the faithful performance and discharge of the duties of the notary as notary public* * *." LSA-R.S. 35:253), Parish of Caddo ("* * * five thousand dollars subscribed in favor of the governor of the state, and conditioned as the law directs for the faithful performance and discharge of his duties as a notary public,* * *." LSA-R.S. 35:392 and 394), and the other 62 parishes of the state ("* * * one thousand dollars conditioned for the faithful performance of all duties required by law toward all persons who may employ him in his profession of notary;* * *." R.S. 35:191), the qualifications and authority (administering of an oath within the parish for which he is commissioned) of a Notary Public are the same in

each of the 64 parishes of Louisiana. Among the general powers of a notary public are many functions for which an oath is administered within territorial jurisdiction but, nevertheless, vitally effect economic interests, property, or rights of parties beyond parish lines. See LSA-R.S. 35:1 et seq and LSA-R.C.C. Article 2232, et seq.

The question presented by this case, is whether a different bond requirement based upon territorial jurisdiction (area limitation of authority to administer an oath) of a Notary under the present statutory scheme bears a rational relationship to the states objective sought to be advanced by LSA-R.S. 35:191, 253, 392, and 394.

Our statutory scheme establishes no classification of Notaries Public. All Notaries Public in Louisiana are similarly treated except for the provisions relating to bond and the requirements of LSA-R.S. 35:323 *et seq*, which apply only to the Parish of Orleans. I perceive of no rational basis for different statutory treatment of these state commissioned officers. Disparate bond requirements based solely upon territorial jurisdiction such as here cannot be sustained. Absent any diversity of authority, the statutory scheme draws a sharp line among the bond requirements for Notaries Public of the Parish of Orleans, Parish of Caddo and the other 62 parishes. It necessarily commands dissimilar treatment among notaries who are similarly situated and produces invidious discrimination. It establishes a differing treatment that is subject to scrutiny under the Equal Protection Clause. For differing treatment of Notaries

Public to be sustained it must be reasonable, not arbitrary and rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all notaries similarly circumstanced shall be treated alike.

The statutory scheme appears to be patently unreasonable. Accordingly, it is my opinion that this case should be remanded for a hearing to determine if there is a reasonable basis for a different bond requirement among Notaries Public and if there is a rational basis for the dissimilar treatment of Notaries Public of Orleans Parish as required by LSA-R.S. 35:323, et seq.

For the reasons assigned, I respectfully dissent.

Supreme Court of Louisiana
New Orleans, 70112

September 12, 1975

STATE EX REL GUY WOOTAN, CUSTODIAN OF NOTARIAL BONDS

No. 56, 581

In re: Glenn L. Morgan applying for certiorari or writ of review to the Court of Appeal, Fourth Circuit, Parish of Orleans

Writ Denied:
The result is correct.

/s/ AT Jr.
/s/ JWS
/s/ FWS
/s/ PFC
/s/ WFM
/s/ JEB

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, September 12, 1975

/s/ Phil Trice
Deputy Clerk

Fifth Edition 1974

STATISTICAL ABSTRACT OF LOUISIANA

Compiled under the direction of
James R. Bobo
and
Jesse M. Charlton, Jr.

Division of Business and Economic Research
College of Business Administration
University of New Orleans
A Member of the LSU System

TABLE I-24

POPULATION, STANDARD METROPOLITAN STATISTICAL AREAS[1] OF LOUISIANA, 1960 AND 1970

Standard Metropolitan Area	1960	1970[2] Total	1970[2] Inside Central City	1970[2] Outside Central City	Percent Increase 1950-60	Percent Increase 1960-70
Alexandria[3]	124,681	131,749	41,557	90,192	18.8	5.7
Grant	13,330	13,671			-6.5	2.6
Rapides	111,351	118,078			22.8	6.0
Baton Rouge[3]	299,755	375,628	165,963	209,665	41.1	25.3
Ascension	27,927	37,086			24.7	32.8
East Baton Rouge	230,058	285,167			45.4	24.0
Livingston	26,974	36,511			34.5	35.4
West Baton Rouge	14,796	16,864			26.1	14.0
Lafayette	84,656	109,716	68,908	40,808	46.6	29.6
Lake Charles	145,475	145,415	77,998	67,417	62.3	[4]
Calcasieu	145,475	145,415			62.3	[4]
Monroe	101,663	115,387	56,374	59,013	36.1	13.5
Ouachita	101,663	115,387			36.1	13.5
New Orleans	907,123	1,045,809	591,502	454,307	27.3	15.3
Jefferson	208,769	337,568			101.0	61.7
Orleans	627,525	593,471			10.0	-5.4
St. Bernard	32,186	51,185			190.3	59.0
St. Tammany	38,643	63,585			43.2	64.5
Shreveport[3]	321,182	334,642	182,064	152,578	27.3	4.2
Bossier	57,622	64,519			43.6	12.0
Caddo	223,859	230,184			26.8	2.8
Webster	39,701	39,939			11.2	0.6
Total[3]	1,984,535	2,258,346			31.9	13.8

[1]"A Standard Metropolitan Statistical Area (SMSA) is a county or group of contiguous counties (except in New England) which contains at least one central city of 50,000 inhabitants or more or 'twin-cities' with a combined population of at least 50,000. In addition to the county, or counties, containing such a city or cities, contiguous counties are included in an SMSA if, according to certain criteria, they are essentially metropolitan in character and are socially and economically integrated with the central city." This classification was first employed in 1960.

[2]See Footnote 2, Table I-4, Page 4.

[3]All figures except "Inside Central City" are computed, according to the SMSA definition as of January 1, 1974.

[4]Less than 0.05 percent decrease.

Source: U.S. Department of Commerce, Bureau of the Census, Census of Population, General Population Characteristics; Number of Inhabitants, Louisiana.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-829

GLENN L. MORGAN,

Petitioner,

versus

STATE OF LOUISIANA EX REL, GUY WOOTAN CUSTODIAN OF NOTARIAL RECORDS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-829

GLENN L. MORGAN,
Petitioner,

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STATE OF LOUISIANA EX REL. GUY WOOTAN
CUSTODIAN OF NOTARIAL RECORDS,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

QUESTION PRESENTED

Are certain provisions of the Louisiana statutes requiring notaries public in Orleans Parish to post a ten thousand dollar bond, to provide yearly evidence of the solvency of the sureties on the bond, and to pay an annual fee, none of which is required of sureties in other parishes of the state, violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

On April 22, 1974 the Custodian of Notarial Records for the Parish of Orleans filed a rule to show cause directed to all notaries in Orleans Parish to test the surety on each notarial bond, to have all notarial acts deposited in his office, and to collect the annual fee allowed him by law.

In response to this rule to show cause, petitioner, Glenn L. Morgan, a notary for Orleans Parish, filed a peremptory exception of unconstitutionality on the grounds that Louisiana Revised Statutes 35:251 et seq. violate the requirements of the Fourteenth Amendment of the Constitution of the United States in that notaries of Orleans Parish are treated in a different manner from the notaries of other parishes of Louisiana.

The state trial court dismissed the exception of unconstitutionality and an appeal was taken by the petitioner.

A majority of the state court of appeal upheld the constitutionality of the challenged statutes and found that the legislature could have had a rational basis for requiring notaries of Orleans Parish to post a higher bond, to produce evidence of solvency of their sureties, and to pay an annual fee. *In re State ex rel. Wootan*, 313 So.2d 621 (La. App. 4th Cir. 1975). Petitioner's motion for rehearing by the appellate court was denied.

The Supreme Court of Louisiana subsequently refused to grant a writ of certiorari or review and held that the result of the court of appeal was correct.

ARGUMENT

Petitioner contends that certain statutes regulating notaries in Louisiana are violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution because they place three requirements on notaries of Orleans Parish that are not placed on notaries outside of that parish. First, under the provisions of Louisiana Revised Statute 35:327, notaries of Orleans Parish are required to pay a $15 annual fee, unlike the notaries of other parishes who are not required to pay an annual fee. Second, instead of the one thousand dollar bond required by Louisiana Revised Statute 35:191 of most of the notaries outside of Orleans Parish, Orleans notaries are required by Louisiana Revised Statute 35:253 to provide a bond of $10,000. Third, the surety on the Orleans notarial bond is tested annually.

The United States Supreme Court has long recognized that statutory schemes challenged under the equal protection clause of the Fourteenth Amendment are subject to varying standards of review depending on the nature of the statutes involved. Where so-called "fundamental rights" or "suspect classifications" are concerned, the Court has required a standard of strict scrutiny to determine whether a state has a compelling interest in enacting and enforcing the challenged statute.[1]

Following these guidelines, the Court has carefully scrutinized statutory classifications involving such

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1 *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

fundamental rights as the right to vote,[2] the right to interstate travel,[3] the right to freedom of association,[4] and the right to a criminal appeal[5] to determine whether such classifications advance a compelling state interest. Statutory classifications based on race[6] or national origin[7] are formally suspect and must also satisfy a compelling state interest.[8]

In this case, however, Petitioner alleges no fundamental right or suspect classification that would require the Court to examine the Louisiana statutory scheme for notarial bonding and annual fee payments with the kind of searching intensity required in the instances described above. The classification involved, that between notaries of Orleans and other parishes, hardly could be viewed as suspect. Similarly, the "right" if any, to become a notary, is clearly not "fundamental" in any constitutional sense. Petitioner's citation to the case of *Goosby v. Osser*, 409 U.S. 512, (1973), a case alleging interference with voting rights, is therefore clearly inapposite to the facts presented here.[9]

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2 *Dunn v. Blumstein*, 405 U.S. 330 (1972).

3 *Douglas v. California*, 372 U.S. 353 (1963).

4 *Kusper v. Pontikes*, 414 U.S. 51 (1973).

5 *Loving v. Virginia*, 388 U.S. 1 (1967).

6 *Graham v. Richardson*, 403 U.S. 365 (1971).

7 *Id.*

8 Illegitimacy, *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164 (1972), and Sex, *Frontiero v. Richardson*, 411 U.S. 677 (1973), hover on the perimeter of the suspect category and appear to require some level of heightened review.

9 Petitioner apparently recognizes that the challenged statutes are not susceptible of strict scrutiny by the Court. After asking ". . . under what standards these facts fit?" the Petitioner answers: "The Petitioner suggests that there is no rational basis for the distinction." Petition, p. 7.

In those instances where neither fundamental rights nor suspect classifications are involved, the Court has applied a more benign standard of review that inquires only whether a "rational basis" exists between the challenged statute and the probable purposes of the legislation.[10] Presumably, this different standard arises from a recognition of the dual responsibility of the Court to uphold constitutional values while recognizing the legislature's role as a coordinate branch of government. In any event, the Court has, in these situations, accorded the challenged legislation with a presumption of constitutionality.[11] And nowhere is the examination of the Court more relaxed than in those areas involving economic or social regulation of distinctly local matters.

In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court held that Sunday closing laws in effect in Maryland's Anne Arundel County were not violative of the Fourteenth Amendment. In so holding, the Court set forth the standard of review ordinarily applicable to state economic regulation:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safe-

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10 *E.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

11 *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); *see Levy v. Parker*, 346 F.Supp. 897 (1972).

> guard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* See Kotch v. Board of River Port Pilot Com'rs, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093; Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369; Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909."
>
> 366 U.S. 420, 425-26 (emphasis added).

The *McGowan* test, that the constitutionality of any statute should be upheld "if any state of facts reasonably may be conceived to justify it," has frequently been cited as controlling in later decisions of the Court.[12]

For example, in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1968), the Court upheld the constitutionality of an Illinois statute that operated to deprive certain inmates of the right to cast absentee ballots. In so doing, the Court, citing with approval the *McGowan* decision, held that distinctions drawn by a challenged statute would be set aside as

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12 *E.g., Lindsey v. Normet*, 405 U.S. 56, 70 (1972); *Schilb v. Kuebel*, 404 U.S. 357 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. The Court further noted that legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.[13]

Similarly, in *Dandridge v. Williams*, 397 U.S. 471 (1970), a Maryland regulation placing an absolute limit on the total grant to which a family was entitled under the Federal Aid to Families with Dependent Children program was challenged on equal protection grounds. In holding that the regulation was constitutional, the Court reviewed the degree of judicial scrutiny to be employed in cases involving state regulation of social and economic matters:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it

13 *McDonald v. Bd. of Election Commr's. of Chicago*, 394 U.S. 802, 809 (1968).

> may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730."
>
> 397 U.S. 471, 485.

In setting out the applicable standards to be applied to review of certain state regulations, the *Dandridge* court further observed: "It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities."[14] This observation regarding challenges to statutory schemes limiting employment opportunities is reinforced by the case of *Goesaert v. Cleary*, 335 U.S. 464 (1948).

In *Goesaert*, the Court was confronted with a Michigan statute that denied bartending licenses to women except the wives or daughters of male bar owners. In holding that the statute was not violative of the Equal Protection Clause, Justice Frankfurter speculated on the purposes of the challenged statute and recognized that the statute's constitutionality could be maintained where if a possible (even if improbable)[15] purpose of the law could have been to effect social and economic aims.

In another case challenging the constitutionality of a Louisiana statute affecting employment, *Kotch v River Port Pilot Commissioners*, 330 U.S. 552 (1947), the Court upheld the Louisiana legislature's scheme of licensing river pilots even though the system in-

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14 *Dandridge v. Williams*, 397 U.S. 471, 486.

15 See *Developments in the Law — Equal Protection*, 82 Harv.L.Rev. 1065, 1079 (1969).

evitably resulted in nepotic hiring practices. In so holding, the Court noted:

> "We are aware of no decision of this Court holding that the Constitution requires a state governor, or subordinates responsible to him and removable by him for cause, to select state public servants by competitive tests or by any other particular method of selection. The object of the entire pilotage law, as we have pointed out, is to secure for the State and others interested the safest and most efficiently operated pilotage system practicable. We cannot say that the method adopted in Louisiana for the selection of pilots is unrelated to this objective."
>
> 330 U.S. 552, 563-65.[16]

As was noted above, the courts have afforded state statutes of the type challenged here a presumption of constitutionality. Far from rebutting that presumption, petitioner failed to introduce evidence of any type in the trial court,[17] let alone evidence that would support a finding of unconstitutionality. Instead, Petitioner apparently relies primarily on the cases of *Hopkins v. Southern California Telephone Company*, 275 U.S. 393 (1928) and *Levy v. Parker*, 346 F.Supp. 897 (E.D.La. 1972) for authority that the Louisiana notarial scheme is unconstitutional. In *Hopkins*, the Court held that persons within the same class were con-

16 In a similar vein, the Court recently affirmed the right of a state to require that political activities on the part of state employees be restricted. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

17 313 So.2d 621, 622 (1975).

stitutionally protected against unequal tax treatment. In the instant case, however, it is readily admitted that notaries of Orleans Parish are in a *different* statutory class than notaries of other parishes. The important question is whether the different classifications are constitutionally permissible under the Fourteenth Amendment. Petitioner's reference to *Levy v. Parker* is similarly inappropriate. In *Levy*, a system of tax distribution created solely for the purpose of reimbursing each parish for lost revenues was found to be inherently incapable of fulfilling that function and patently "arbitrary,"[18] establishing "a rule for distributing state funds that is no rule at all."[19] Unlike the plaintiff in *Levy*, Petitioner has failed to show that the statutory scheme challenged here does not operate on "any basis that might constitute coherent governmental policy."[20] Furthermore, a review of the possible reasons the Louisiana legislature adopted the notarial system reveals numerous arguments showing the possible benefit and rationality of the notarial laws of Louisiana.

As a preliminary matter, the special role of the Louisiana notary should be noted. Louisiana's notarial system is the product of three distinct legal heritages: French, Spanish, and North American. The result is what is generally regarded as the most unique notarial system in the United States. The Louisiana notary, for instance, is separated from his counterpart in other states by two distinguishing characteristics: he is commissioned for life, subject to good

18 *Levy v. Parker*, 346 F.Supp. 897, 903 (E.D. La. 1972).

19 *Id.*

20 *Id.* at 904.

behavior, and he is usually an attorney.[21] While he may not be licensed to practice law, the Louisiana notary nevertheless has complete authority to confect legal documents, provided he has passed the stringent notarial examination given twice a year for those who are not already attorneys.[22]

Consequently, the Notary Public in Louisiana is a highly respected professional by virtue of his awesome legal responsibility. Because the grave responsibilities shared by Louisiana notaries generally are heightened in the case of the Orleans notary for reasons discussed below, the state legislature, through the statutes challenged in this case, has set special requirements for the notary practicing in Orleans Parish.

The requirements of La. R.S. 35:253 and La. R.S. 35:328 that Orleans notaries provide a bond with one or more solvent sureties in the sum of $10,000, while bonds of only $1,000 are required in all of the other parishes except Caddo Parish, and that sureties for Orleans notaries be tested yearly are supportable for several reasons. First, the population of Orleans Parish is both greater and more dense than the population of any other parish. Since it is likely that more people will require the services of notaries in Orleans Parish than in any other parish, it is reasonable for the legislature to require a higher bond in Orleans Parish. Similarly, a higher bond is justified on the basis that notaries, who incur statutory responsibility in connection with the conveyance of real estate in Loui-

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21 *See* La. R.S. 35:1 *et seq.* (1950).
22 *Id.*

siana, would be dealing with properties of a greater total value in Orleans Parish. Viewed in this context, it hardly seems irrational to require that a notary who is potentially responsible for dealing with valuable real estate on a frequent basis could be required to provide a bond of $10,000. The Louisiana legislature, mindful of the Orleans notary's special role, recognized that a $1,000 bond was insufficient to provide meaningful protection to persons damaged by the notary's negligence. For the same reasons, an annual testing of the notary's surety on the bond is justified.

The Louisiana appellate court was mindful of the special role of population and density in Orleans Parish in its opinion upholding the constitutionality of the system.

> "But despite these considerations we can still conceive of reasonable facts which the legislature might have considered in establishing the distinction. For instance, R.S. 35:2 lists a number of powers granted to notaries, some of which are perhaps even more serious than those which affect real estate, and the power of the notary to function is limited to the Parish where he is commissioned, R.S. 35:2 and 10. Even the power of a notary to administer oaths and take acknowledgments is limited to the parish where he is commissioned. Op.Atty.Gen. 1934-36, p. 818 and 1920-22, p. 899. Perhaps the legislature believes that the density of the population in Orleans Parish is still such that the potential of the Orleans notary to

> exercise his official functions is still greater than that of the notary commissioned outside of Orleans Parish and that these conditions operate to justify greater protection to the public in the form of a higher bond for Orleans notaries than elsewhere. Perhaps the legislature believes that this higher potential for functioning requires a closer method of checking on Orleans notaries with the attendant annual fee and the regular reporting system provided by the statutes."
>
> 313 So.2d 621, 624.

Petitioner also contends that Louisiana R.S. 35:327, which requires a $15 annual fee, is in violation of the Fourteenth Amendment because an identical fee is not charged to notaries in other parishes. This argument overlooks the unique nature of the method of storing notarial records in Orleans Parish. In parishes outside of Orleans, official acts of notaries are normally stored in facilities maintained by the Clerk of Court for each parish. The costs of maintaining the necessary storage facilities and personnel are borne by the office of the Clerk of Court of the parish and are payable out of revenues he receives in connection with other functions performed by his office.[23] However, in Orleans Parish a special office for the storing and indexing of notarial records has been created by statute.[17] This statute requires that a special custodian maintain original notarial records of notaries of Orleans Parish. Unlike the expenses incurred by the cus-

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23 *See In re State ex rel. Wootan*, 313 So.2d 621, 624 (La. App. 4th Cir. 1975).

24 La. R.S. 35:323 (1950).

todians of notarial acts in many other parishes, the expenses of the custodian in Orleans Parish are not paid out of operating funds from the Clerk of Court of the parish. Instead, his operating funds come from two principal sources: a $3.00 filing fee for each recordation[25] and the yearly $15.00 fee charged to all Orleans notaries.[26] Additionally, it is not true, as petitioner has implied, that the recordation costs of parishes other than Orleans are uniform. In point of fact, each parish charges varying fees for the cost of recording notarial acts. These variances can readily be explained in terms of varying costs associated with maintaining facilities and personnel needed in each parish. Thus, there is ample indication that a rational basis exists for the additional filing fee required of notaries in Orleans Parish.

CONCLUSION

The standard of review applicable to state statutory schemes that impinge on fundamental rights or promote classifications that are inherently suspect is inapposite in this case. Instead, a relaxed standard that inquires into the possible reasonableness of the statutory scheme is appropriate. Applying that standard to Louisiana's requirements for notarial practice in Orleans Parish mandates a finding that the requirement of a higher bond that is tested regularly and the payment of an annual fee is not violative of the Equal Protection Clause of the Fourteenth Amendment. Therefore, the petition of Glenn L. Morgan for writ of certiorari should be denied.

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25 La. R.S. 35:323 (1950).

26 La. R.S. 35:327 (1950).

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Louisiana have been mailed, postage prepaid, to the Petitioner, Glenn L. Morgan, P. O. Drawer 51478, New Orleans, Louisiana 70151, this ____ day of January, 1976.

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